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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 179.

JOHN KENNY, PETITIONER,

vs.

LABAN MILES AND JOHN L. BIRD, ADMINISTRATOR OF THE ESTATE OF LAH-TAH-SAH, DECEASED OSAGE INDIAN, ROLL NO. 256.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF FOR RESPONDENT LABAN MILES.

Statement.

The statement of Mr. Solicitor General King and Mr. Assistant Attorney General Kearful in their brief for the petitioner is, in the main, correct, *except* the statement near the bottom of page 3 that, "Pending the partition suit in the district court, the administration in the county court was

suspended." We controvert this statement, and say that the probate proceeding in the county or probate court was begun July 8, 1912 (Printed R., 4), and has been continuously pending ever since, first in the County Court of Osage County, Oklahoma, then on appeal to the District Court of Osage County, Oklahoma, then on appeal to the Supreme Court of Oklahoma, and now before this honorable court on writ of certiorari.

On February 28, 1913, respondent herein, Laban Miles, as plaintiff, filed a partition suit against the petitioner herein, John Kenny, as defendant therein, for the partition of about 660 acres of land deeded on behalf of Lah-tah-sah, deceased, under the provisions of an act of Congress approved June 28, 1906 (34 Stat. L., 539); (Printed R., 49-50). The two cases ran concurrently in the two courts of original jurisdiction. The district court judgment, pleaded as *res adjudicata* in the county court, was rendered on May 31, 1913 (Printed R., 52), and pleaded in the county court February 28, 1914, three months after the expiration of the six months' period in which an appeal might have been taken from the district court judgment in the partition suit.

We also wish to controvert the statement on page 8 of petitioner's brief that the finding of the Supreme Court of Oklahoma that "the lands were selected and patented in her name subsequent to her death" (meaning Lah-tah-sah, deceased) was contrary to the record. We will cite authorities on this proposition in our argument.

Propositions.

1. We insist that the court has no jurisdiction for want of a Federal question, and have filed a motion to dismiss for that reason. (Appendix A.)

2. That the district courts of Oklahoma have jurisdiction to determine heirs in partition suits and in suits to quiet title and for possession when necessary to ascertain and de-

termine the interest and ownership of the parties to such suits, when the land sought to be partitioned, the title quieted, or possession gained, has been acquired by the parties by descent, and especially where the question of heirship is dependent upon the validity or invalidity of a marriage.

3. That the judgment rendered by the District Court of Osage County, Oklahoma, in the partition suit of Laban Miles *versus* John Kenny, wherein the validity of the marriage of Laban Miles and said Lah-tah-sah, deceased, was in issue, was litigated and decided, and in which the district court decided that Laban Miles, as the surviving husband, was an heir of said Lah-tah-sah, and as such inherited an undivided one-half interest in her estate, was, and is, final and conclusive between the parties, and no appeal having been taken the same became and is *res adjudicata.*

(*a*) Because under section 6 of the act of Congress approved April 18, 1912 (37 Stat. L., 86), the *judgment,* determining the interests and ownership of the parties to the land involved, is not required to be approved by the Secretary of the Interior. It is only the *partition,* or actual *division* of the land, in case of a partition in kind, or the *sale* in case partition in kind cannot be made, that is subject to the approval of the Secretary. In case of *a sale* the deeds evidencing the sale are submitted to the Secretary of the Interior for his approval. In case of *a partition in kind* the *schedule of partition or division* must be submitted to the Secretary for his approval, in case of restricted lands, but *not* the *judgment* of the court under which a *partition* or *sale* may be had.

(*b*) Because in the case at bar the lands involved are not restricted lands, and neither the judgment, nor the partition, nor the sale need the approval of the Secretary of the Interior.

ARGUMENT.

I.

The court has no jurisdiction for want of a Federal question, and the motion to dismiss should be sustained.

No Federal Question Raised or Presented.

No Federal question is presented in the record. The only question litigated, or sought to be litigated, by petitioner, John Kenny, at any time, or in any action, is the question of the marriage of his mother, Lah-tah-sah, and the respondent, Laban Miles. If Laban Miles was the surviving husband of Lah-tah-sah, he was an heir. Section 6895 of Wilson's Revised and Ann. Statutes of Oklahoma, then in force, provides *inter alia* for descent in the following manner:

> "First: If the decedent leave a surviving husband or wife, and only one child or the lawful issue of one child, in equal shares to the surviving husband or wife, and child, or issue of such child."

This statute was made applicable to deceased members of the Osage tribe of Indians by section 6 of the Osage division act, *supra,* which provides:

> "Sec. 6. That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband, nor wife, in which case said lands, moneys and mineral interests must go to the mother and father equally" (35 Stat. L., 545).

Carney *vs.* Chapman, 247 U. S., 102, is a case where the validity of an Indian marriage was involved as determining

heirship. The opinion was handed down May 20, 1918, and Mr. Justice Homes speaking for the court said *inter alia:*

> "If any Federal question is presented in this case it arises under the act of Congress of May 2, 1890, chap. 182, section 38, 26 Stat. at L., 81, 89, by which all marriages theretofore 'contracted under the laws or tribal customs of any Indian nation' located in the Indian territory, are declared valid. The date of the supposed marriage was in 1887, and therefore, if it complied with the terms of the act, it was validated if not valid before. The plaintiff in error, after asking instructions as to what constituted a common-law marriage that were given in substance, asked for another that a common-law marriage was not recognized by the Chickasaws, and that a marriage of Chickasaws without a compliance with their laws was void. Taking all the requests for rulings and the rulings together we are inclined to agree with the court below that common-law marriage and marriage under the customs of the tribe were used as equivalent phrases, and to assume in favor of the plaintiff in error that the request means that a marriage of Chickasaws, although in accord with their customs, was invalid under a Chickasaw Act of October 12, 1876, unless solemnized by a judge or ordained preacher of the Gospel. This assumption would seem to carry with it the implication that the act of Congress did not validate a marriage in accordance with still prevailing custom if no judge or preacher added his sanction, and so to ask a construction of that act that, again by implication, was refused."
>
> "In this somewhat remote way a Federal question is opened, but it cannot profit the plaintiff in error. There was some evidence that Charles Puller and Louisa James held themselves out as man and wife and were reputed married. There was evidence also that it was customary to disregard solemnization before a judge or preacher. It would be going somewhat far to construe the Chickasaw statute as purporting to invalidate marriages not so solemnized. The act of Congress made valid marriages under either custom or law."

In the case at bar there is no act of Congress that bears in any way upon the marriage of Laban Miles and his wife, Lah-tah-sah. The act of May 2, 1890, *supra*, has no application, because the Osage Nation became a part of Oklahoma Territory in 1889 and was not a part of the Indian Territory in 1890, when the act was passed, and the marriage in question took place in 1907.

Question of State Law.

Whether Laban Miles is a legal heir of Lah-tah-sah is to be determined by State law exclusively, and is not a Federal question. Whether Laban Miles is such heir depends solely upon the question as to whether he was married to, and the surviving husband of Lah-tah-sah. This in turn is governed exclusively by State law, and is not a Federal question. No other question was raised by John Kenny in his objections to the administrator's final account in the probate court. No other question was raised on appeal from the probate court to the District Court of Osage County, Oklahoma. No other question, other than as to local procedure, was raised, or presented on appeal to the State Supreme Court. The sole object and purpose of John Kenny was to establish himself as the sole heir of his mother, Lah-tah-sah, even though to do so would brand her as an adulteress. In his petition in error to the State Supreme Court his allegations of error in the main are that the trial court erred in "adjudging and decreeing that the final account" of the administrator "be approved." (Not a Federal question.) And erred in "adjudging and decreeing that said Laban Miles was the surviving husband, and one of the heirs." (Not a Federal question.) And erred in "distributing the estate" * * * "one-half to the said Laban Miles and one-half to the plaintiff in error," John Kenny. (Not a Federal question.)

Whether Lands Allotted Before or After Death Immaterial.

Whether the lands involved were allotted and deeded to Lah-tah-sah as grantee in her lifetime, or to her heirs after her death; or whether the lands involved were restricted or unrestricted as to alienation have nothing whatever to do with the question as to whether said Laban Miles was the surviving husband of Lah-tah-sah, deceased, and thereby an heir.

Whether Parties Full-bloods or Mixed-bloods Immaterial.

Also whether Lah-tah-sah, Laban Miles, and John Kenny was, or are, full-blood or mixed-blood Osage Indians, or whether a certificate of competency has been issued to either of them, has nothing to do with the question as to whether Laban Miles was, or is, the surviving husband of Lah-tah-sah, deceased, and thereby an heir.

Again, by neither the manner in which, nor the procedure by which a State court decides a purely State question, governed solely by State law, and where there is no adverse citizenship, can a Federal question be raised or involved.

Whether Laban Miles is Surviving Husband Not Federal Question.

In *Roth vs. Ehman et al.*, 17 Otto, 319; 27 L. Ed., 490, the full decision of this honorable court reads as follows:

> "The only question in this case, controverted below, was whether Madelaine Roth, the plaintiff in error, was the widow of John George Roth, deceased, and that depended entirely on the validity of the decree of the Royal Matrimonial Court of Elwangen, in the Kingdom of Wurtemburg, annulling the marriage of the parties. The Supreme Court of Illinois decided in favor of the Wurtemburg decree, and consequently, that the plaintiff in error was not the widow of the decedent and not entitled to dower in his

estate, or to inheritance under the laws of Illinois. This presents no question of which we can take cognizance under section 709 of the Revised Statutes. No right, title, privilege or immunity which could be claimed under the authority of the United States was involved, and the validity of no treaty or statute of, or any authority exercised under the United States was drawn in question. Neither was there any statute or authority of the State relied on, which was in conflict with the Constitution, treaties or laws of the United States.

"The motion to dismiss for want of jurisdiction is granted."

Also:

"The question of the true construction of a will depends wholly upon general rules of law and upon the local statutes, and in no degree upon the Constitution, laws or treaties of the United States." *Giles vs. Little*, 134 U. S., 645; 33 L. Ed., 1062.

Whether Laban Miles was the surviving husband of Lah-tah-sah was a question of fact to be determined by the State court only, and under the State law applicable to the facts.

Questions of Fact Not Reviewed by Federal Supreme Court.

The Supreme Court of the United States has no power under section 237, R. S., to review a finding of fact by a State court, even though the finding determines whether or not a Federal question is presented. *King vs. W. Va.*, 216 U. S., 92; 54 L. Ed., 396; *Waters-Pierce Oil Co. vs. Texas*, 212 U. S., 159; 43 L. Ed., 770.

"The Supreme Court will not review a final State-court judgment, even if it denies some title, right, privilege, or immunity of the unsuccessful party, unless it appears from the record that such title, right, privilege, or immunity was 'specially set up' or claimed and denied in the State court as belonging to such party under the Constitution or some treaty,

statute, commission, or authority of the United States." *F. G. Oxley Stave Co. vs. Butler County,* 166 U. S., 648; 41 L. Ed., 1149.

"To give the Supreme Court of the United States jurisdiction to review a judgment of a State court because of its denial of a right, title, privilege, or immunity claimed under the Constitution, or any law or treaty of the United States, it must appear of record that such 'right, title, privilege, or immunity' was 'specially set up' or claimed at the proper time and in the proper way." *Texas & P. R. Co. vs. Southern P. Co.,* 137 U. S., 48; 34 L. Ed., 614; *California Powder Works vs. Davis,* 151 U. S., 389; 38 L. Ed., 206; *French vs. Hopkins,* 124 U. S., 524; 31 L. Ed., 536; *Spies vs. Illinois,* 123 U. S., 131; 31 L. Ed., 80; *Chappell vs. Bradshaw,* 128 U. S., 132; 32 L. Ed., 369; *Leeper vs. Texas,* 139 U. S., 462; 35 L. Ed., 225.

Only Right Claimed by Petition.

The only right claimed by petitioner, John Kenny, was the right which he claimed to relitigate the question of the marriage of his mother, Lah-tah-sah, and the respondent, Laban Miles, when the matter came up in the county or probate court, on the final account of the administrator for determination of heirs. This claim involved no "right, title, privilege, or immunity claimed under the Constitution, or any treaty or statute" of the United States. The judgment pleaded as *res judicata* was a State judgment, based on State law governing judgments rendered in actions for the partition of real estate, and whether the State court was right or wrong in sustaining the plea of *res judicata* it was purely a matter of local law and local practice. The admission of the former judgment in evidence in a matter triable only in a State court and under State law was a denial of no Federal right and raised no Federal question.

"A decision against a right set up under U. S. Rev. Stat., sec. 2339, providing for the protection of vested water rights, is not involved in a judgment of a State court denying such rights, which rest solely upon a

decision upon questions of fact or local law upon which rights under that section depend." *Telleride Power Trans. Co. vs. Rio Grande Western R. Co.*, 187 U. S., 659; 47 L. Ed., 307.

Decision of State Court Plainly Right.

"If it appears that the decision of the Federal question was so plainly right as not to require argument, the writ should not be allowed." *Spies vs. Illinois.* 123 U. S., 574; 28 L. Ed., 1084.

"A Federal question which rests upon an obviously false assumption is so plainly devoid of merit as to afford no basis for the exercise by the Federal Supreme Court of its appellate jurisdiction over a State court." *Parker vs. McClain*, 237 U. S., 469; 59 L. Ed., 1051.

If the judgment of the district court pleaded as *res adjudicata* was for any reason not a final judgment, or not a judgment between the same parties, or if its subject-matter was so different as not to constitute a bar to a subsequent action, then the judgment would not be admissible in evidence in support of the plea. But whatever the defect, if any, its admission in evidence, if error, would not raise a Federal question. Suppose the judgment offered in evidence as a bar to a relitigation of the marriage in question had been rendered in an action between Laban Miles and a former husband of Lah-tah-sah in a contest as to which was the surviving husband, and John Kenny had not been made a party and took no part in the proceedings, and such a judgment had been pleaded in the probate proceedings as a bar to the claim of John Kenny as the sole heir, and erroneously admitted in evidence and the plea of *res adjudicata* sustained. John Kenny would have had his right of appeal in the State courts, but no Federal question would have been raised, but merely a question under the State law as to the admissibility of the same in evidence.

The contention that the petitioner is not estopped

or barred by the former adjudication does not present a Federal question. *John vs. Pullian*, 231 U. S., 583; *Washington vs. Miller*, — U. S., —; 59 Law Ed., 295.

II.

The district courts of Oklahoma have jurisdiction to determine heirs in partition suits and in suits to quiet title and in suits for possession of real property when necessary to ascertain and determine the interest and ownership of the parties to such suits, when the land sought to be partitioned, the title quieted, or possession gained, has been acquired by the parties by descent, and especially where the question of heirship is dependent upon the validity or invalidity of a marriage.

In the partition suit between the parties to the case at bar, wherein the judgment pleaded as a plea of *res adjudicate* was rendered, the petitioner, John Kenny, as defendant therein, filed an answer and *cross-petition* denying the marriage of his mother, Lah-tah-sah, and Laban Miles and alleging that he was the sole and only heir; that he was in the constructive possession of the lands and the absolute owner of same by inheritance, and that he was entitled to the immediate actual and exclusive possession thereof; that the claim of the plaintiff, Laban Miles, as set out in his petition constituted a cloud upon his (John Kenny's) title. In the prayer of his answer and *cross-petition* he prayed that he be adjudged to be the sole owner of the lands and entitled to the immediate and exclusive possession thereof and that the *title* in and to said lands and every part and portion thereof *be quieted in the defendant* therein (John Kenny) and that the plaintiff, Laban Miles, be adjudged to have no right, title or interest therein (Printed R., 50-51). Thus the very question raised by him and litigated in the district court, is the very question he again tried to litigate in the county court.

We wish to emphasize the fact that the suit in the district

court wherein the judgment pleaded in the case at bar as *res adjudicate* was rendered, was an action for partition on the part of the plaintiff, and an action to *quiet title* and for *possession* on the part of the defendant John Kenny, under his answer and cross-petition, and in which we insist that the district court had jurisdiction to adjudicate the validity or invalidity of the marriage in question as affecting the question of heirship of the surviving spouse, and the ownership of the lands in question sought to be partitioned, and thus the determination of the heirs of said Lah-tah-sah, deceased.

The sections of the Revised Laws of Oklahoma, 1910, on partition of real estate, applicable in the case at bar, as relate to the partition judgment pleaded as *res adjudicata*, are as follows:

> "Sec. 4940. When the object of the action is to effect a partition of real property, the petition must describe the property and the respective interest of the owners thereof, if known."
>
> "Sec. 4941. If the number of shares or interest is known; but the owners thereof are unknown, or if there are, or are supposed to be, any interests which are unknown, contingent or doubtful, these facts must be set forth in the petition with reasonable certainty."
>
> "Sec. 4943. The answers of the defendants must state, among other things, the amount and nature of their respective interests. They may also deny the interests of any of the plaintiffs, or any of the defendants."
>
> "Sec. 4944. After the interests of all the parties shall have been ascertained, the court shall make an order specifying the interests of the respective parties, and directing partition to be made accordingly."
>
> "Sec. 4955. The court shall have full power to make any order, not inconsistent with the provisions of this article, that may be necessary to make a just and equitable partition between the parties, and to secure their respective interests."

Section 6 of the act of Congress of April 18, 1912, *supra*, provides in part as follows:

> "That from and after the approval of this act the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the State of Oklahoma: *Provided*, That no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior."

Under this, and the preceding sections of the statute quoted, we think that this court in a partition suit not only has jurisdiction to, but must make an order specifying the interests of the respective parties and direct that partition be made accordingly, as required by section 4944, which would authorize the determination of heirship where ownership was acquired by inheritance. Section 4955 authorizes the court to make any order that may be necessary to make a just partition between the parties and to secure their respective interests. That this is the rule in other States, see the following:

> "Any court assuming jurisdiction of the proceeding for partition must undertake to determine to whom the estate of the decedent has passed either by inheritance or devise."
> 30 Cyc., 198, and note 40.

That this is the law in Oklahoma is established by the following cases in which the district court decided questions of heirship in partition suits:

Irving vs. Diamond, 100 Pac., 557; 23 Okl., 325.
De Graffenreid vs. Iowa Land & Trust Co., 20 Okl., 687; 95 Pac., 624.
Barnett vs. Way, 29 Okl., 780; 119 Pac., 418.
Divine vs. Harmon, 30 Okl., 820; 121 Pac., 219.

Bilby vs. Brown, 34 Okl., 738; 126 Pac., 1024.
Coachman vs. Sims, 36 Okl., 536; 129 Pac., 845.
Hill vs. Hill, — Okl., —; 160 Pac., 1116.

There is no more reason why the district court has authority to pass on disputed questions of heirship in actions to quiet title, actions in ejectment, and actions to declare a resulting trust, than in partition actions. The following are some of the Oklahoma cases where the district court decided contested questions of heirship:

Cases Where Oklahoma District Court Has Determined Heirs Affirmed by Federal Supreme Court.

Washington vs. Miller, 34 Okl., 259; 129 Pac., 58, affirmed *Washington vs. Miller,* 235 U. S., 422; 59 L. Ed., 295. (To quiet title.)

Woodward vs. De Graffenreid, 36 Okl., 81; 131 Pac., 162, affirmed in 238 U. S., 284; 59 L. Ed., 1310. (Ejectment.)

Brady vs. Sizemore, 33 Okl., 169; 124 Pac., 615, affirmed in 235 U. S., 441; 59 L. Ed., 308. (To determine question of heirship.)

McDougal vs. Mckay, 43 Okl., 261; 142 Pac., 987; affirmed in 237 U. S., 372; 59 L. Ed., 1001. (To determine heirs of Creek infant enrolled after death.)

Pigeon vs. Buck, 38 Okl., 101; 131 Pac., 1983, and *Roberts vs. Underwood,* 38 Okl., 376; 132 Pac., 673, consolidated and affirmed in 237 U. S., 386; 59 L. Ed., 1007. (To quiet title.)

Other Oklahoma Cases.

Ground vs. Dingman, 33 Okl., 760; 127 Pac., 1078. (Quiet title.)

Morley vs. Fewell, 22 Okl., 452; 122 Pac., 700. (Quiet title.)

Warren vs. Canard, 30 Okl., 514; 120 Pac., 599. (Quiet title.)
Shellenberger vs. Fewell, 34 Okl., 79; 124 Pac., 617. (Ejectment and quiet title.)
Hooks vs. Kennard, 28 Okl., 457; 114 Pac., 744. (Ejectment.)
Sanders vs. Sanders, 28 Okl., 59; 117 Pac., 338. (Ejectment.)
Cyr vs. Walker, 28 Okl., 281; 116 Pac., 931. (Ejectment.)
Clarkson vs. Washington, 38 Okl., 4; 131 Pac., 935. (Ejectment.)
Buck vs. Branson, 34 Okl., 807; 127 Pac., 436. (Ejectment.)
Bruner vs. Sanders, 26 Okl., 676; 110 Pac., 730. (Ejectment.)
Lamb vs. Baker, 27 Okl., 739; 117 Pac., 189. (Ejectment.)
Reynolds vs. Fewell, 34 Okl., 112; 124 Pac., 623. (Ejectment.)
Ground vs. Dingman, 33 Okl., 760; 127 Pac., 1078. (Ejectment.)
Fearnow vs. Jones, 34 Okl., 694; 126 Pac., 1015. (To declare resulting trust.)

Judgment of District Court in Partition Suit is a Final Judgment and May Be Appealed From.

The judgment and decree of partition fixed the interests and ownership of the lands involved in the parties to the action, who are the same parties to the case at bar. No appeal was taken, and time in which an appeal might have been taken had expired when the plea of *res adjudicata* was filed. An appeal could have been taken prior to sale. In *State ex Rel. Mose vs. District Court,* not yet officially reported, 149 Pac., 240, the Supreme Court of Oklahoma said:

> "There is no question but what an appeal from a decree of partition lies from the district court to this

> court. * * * The purchaser at the sheriff's sale, if it should go to that extent, would have notice of the appeal, and therefore could not be an innocent or protected purchaser."

In the case just quoted from, a writ of prohibition was sought to prevent the District Court of Marshall County, and the presiding judge thereof from entering an order determining the interests of all parties and partitioning certain real estate belonging to full-blood Mississippi Choctaw Indians, on the ground that the lands were restricted Indian lands and that the court had no jurisdiction to partition same. The writ was denied, the court holding that an appeal was a proper and adequate remedy, and that when an appeal will lie from the judgment about to be rendered a writ of prohibition will not lie.

The petitioner herein likewise had a remedy by appeal from the judgment of the district court in the partition suit, and after the time expired in which an appeal could have been taken, the judgment became *res judicata* and was a good plea in bar in the subsequent proceedings.

III.

The judgment rendered by the District Court of Osage County, Oklahoma, pleaded and proven as *res adjudicata* in the case at bar in the probate court, was and is final and conclusive between the parties, and no appeal having been taken the same became and is *res adjudicata.*

(*a*) Because under section 6 of the act of Congress approved April 18, 1912 (37 Stat. L., 86), the *judgment,* determining the interests and ownership of the parties to the land involved, is not required to be approved by the Secretary of the Interior. It is only the *partition* in kind, or the actual *division* of the land, in case of partition or division in kind, or the *sale,* in case partition in kind cannot be made, that is subject to the approval of the Secretary.

Where the lands sought to be partitioned are *restricted*

lands of a deceased Osage *allottee,* in case of *a sale* the deeds evidencing the sale are submitted to the Secretary of the Interior for his approval. In case of a *partition,* in kind, the *schedule of partition, or division,* must be submitted to the Secretary for his approval, but *not* the *judgment* of the court under which a *partition* or *sale* may be had.

The lands involved in the case at bar are *unrestricted,* but if they were restricted the judgment of the court fixing the rights and determining the interests and ownership of the parties does not require, and could not be affected by, the approval or disapproval of the Secretary of the Interior. The judgment of the court rendered in a partition suit is very similar to a judgment rendered in a proceeding to foreclose a real estate mortgage. The judgment in a foreclosure suit fixes the rights of the parties, determines the ownership in the lands if brought in question, establishes priority of liens and orders the lands sold on condition that payment be not made within a time stated. In the event of a sale same is conducted by the sheriff, and although a judicial sale, the acts of the sheriff are ministerial.

The judgment of the court in a partition suit fixes the rights of the parties, determines the ownership of the lands if brought in question, determines the number of shares and the amount of each, establishes priority of liens if any, and orders the lands sold on condition that same cannot be divided or partitioned in kind. In the event of sale, same is conducted by the sheriff as in the case of the sale of lands upon execution. While such sale is a judicial sale, the acts of the sheriff therein are ministerial, and the deed of the sheriff by which such sale is consummated might by law be made subject to the approval of the Secretary of the Interior or the Auditor of State, if a check upon the sheriff was desired in such matters. If the lands are divided or partitioned in kind, this is done by three commissioners appointed for that purpose. Their acts in dividing the lands and reporting such division are ministerial and might by law be made subject to the approval of the Secretary of the Interior, or

the Auditor of State. But not so as to the *judgment of the court* by which the rights of the parties, their ownership and interests in the lands are adjudicated. From such a judgment an appeal lies to the State Supreme Court. And if a Federal question be involved, a further appeal would lie to the Federal Supreme Court. If such a judgment of the trial court is subject to approval of the Secretary of the Interior, then the judgment of the State Supreme Court on appeal, and the judgment of the United States Supreme Court on further appeal involving a Federal question would be subject to the approval or disapproval of the Secretary of the Interior. Such is the position taken by the petitioner. It is unthinkable. It would be unconstitutional and disastrous to our system of government, if carried out, to require the solemn judgment of the constituted judiciary of the State courts to be submitted to the Secretary of the Interior for his approval, or for review and reversal by him.

Section 3 of the act of Congress of April 18, 1912, submits the property of the Osage Indians to the probate jurisdiction of the county courts of the State of Oklahoma. By this section the superintendent of the Osage Indian agency is "authorized, whenever the interests of the allottee require, to appear in the county court for the protection of the interests of the allottee." Also in case an Osage estate is being dissipated or wasted "by reason of the negligence, carelessness, or incompetency of the guardian or other person in charge of the estate, the superintendent of the Osage agency, *or the Secretary of the Interior,* or his representative, shall have power, and it shall be his duty to report said matter to the county court" and may "prosecute any remedy, either civil or criminal," at the cost and expense "of the estate of the allottee" or the "person in charge of the estate of the allottee and his surety, *as the county court shall determine.*" Nowhere in this section or elsewhere is the *judgment* of the county court in any matter made subject to the approval of the Secretary of the Interior. Yet the county courts of Oklahoma are inferior to the district courts, and appeals lie

in all probate matters from the county court to the district.

The contention of the petitioner that the power of the District Court of Oklahoma is that of a "Federal agency" is not supported by *Okla. Oil Co. vs. Bartlett,* 236 Fed., 488, 94, nor any of the other cases cited. *Truskett vs. Closser,* 198 Fed., 835, cited by petitioner, is not in point. It is to the effect that the District Court of Washington County, Oklahoma, did not have jurisdiction to confer majority rights on an Indian allottee under twenty-one years of age so as to qualify him to lease or otherwise transfer his allotment, as against a Federal restriction placed upon such minors.

In *Okla. Oil Co. vs. Bartlett, supra,* it is said:

> "The act of Congress of May 27, 1908, 35 Stat. L., 315, that the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land, provided that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of the deceased allottee."

In reference to this act the court further said:

> "The county court, in approving the conveyance by the heirs of a deceased allottee, under the statute of the United States above set forth, does not exercise judicial power conferred by the laws or Constitution of the State of Oklahoma nor any Federal judiciary power."
>
> "The purpose of said act of Congress was to permit lands to be conveyed by full-blood Indian heirs of a deceased allottee with the specific restriction that such conveyances were invalid, unless approved by the county court therein named, and was intended to prevent imprudent sales by this class of Indians."

The action of the court was merely ministerial in the approval of such a *conveyance.* The court had nothing to do with negotiating the sale of such land. This was left to the full-blood Indian. He made his own contract in his indi-

vidual capacity and executed a deed conveying the land, and when this was done such a deed to be valid had to have endorsed thereon the approval of county judge or county court. Not so in a partition suit to partition real estate. There a *suit* is filed, issues are joined between the parties, and these issues are tried and a judgment rendered in a regular judicial proceeding, and the action of the court is judicial and not ministerial.

(*b*) Because in the case at bar the lands involved are not restricted lands, and neither the judgment, nor the partition, nor the sale need the approval of the Secretary of the Interior.

The record shows, and it is admitted by all parties, that Lah-tah-sah, deceased, Osage Roll #256, died intestate August 19, 1908. Had she received her allotments of lands at that time, as contended by petitioner? We say not. The first allotment deed (Printed R., 69) was dated September 23, 1908, but not approved by the Secretary until February 20, 1909. The second allotment deed (Printed R., 67) was dated May 5, 1909, but not approved until July 30, 1909. The sixth subdivision of section 2 of the Osage Division act of June 28, 1906, *supra*, among other things, provides that:

> "The schedules of said selections and division of lands herein provided for shall be subject to the approval of the Secretary of the Interior."

The petitioner, by "Appendix A" of his brief, at page 31, shows that the schedule of the first, second, and third selections was not approved until November 19, 1909. And at page 34 of his brief, by the same "Appendix A," he shows that the schedule of final division was not approved until August 2, 1909. By the approval of the schedules, as shown by petitioner's brief at the pages referred to, deeds were directed to be issued. The deeds when issued and approved could in no event relate back farther than the date of the approval of the schedule of allotments.

The act of June 28, 1906, *supra*, provided for an equitable

division of the lands belonging to the Osage tribe of Indians, giving to each member entitled thereto, or to his heirs, his *pro-rata* share thereof in acres, and provided for the issuance of fee-simple deeds of conveyance, with stated restrictions against alienation. When did a member receive his *pro-rata* share thereof in acres and become an *allottee?*

In *Sizemore vs. Brady,* 235 U. S., 441; 59 L. Ed., 308, this honorable court said:

> "On the part of the maternal cousins it is contended that the provisions in the original agreement relating to the allotment and distribution of the tribal lands and funds were in the nature of a grant *in præsenti,* and invested every living member of the tribe and their heirs, designated in the tribal law, of every member who had died after April 1, 1899, with an absolute right to an allotment of lands and a distributive share of the funds, and that Congress could not recall or impair this right without violating the due process of law clause of the 5th amendment to the Constitution. To this we cannot assent. There was nothing in the agreement indicative of a purpose to make a grant *in præsenti. On the contrary, it contemplated that various preliminary acts were to precede any investure of individual rights. The lands and funds to which it related were tribal property, and only as it was carried into effect were individual claims to be fastened upon them.* (Italics ours.)

Also, in the case of *Woodward vs. De Graffenreid,* 238 U. S., 284; 59 L. Ed., 1310, reading on 1327, the Supreme Court of the United States said:

> "In our opinion the equitable title to the Agnes Hawes allotment was vested in her heirs according to Creek law by the clear meaning of paragraph 28, which says: 'All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled * * * shall be placed upon the rolls * * * and if any citizen had died since that time * * * before receiving his allot-

ment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled if living shall descend,' etc. *Although she had been placed in possession of an allotment, she had not in her lifetime 'received' it, in the sense* of the Agreement, *for this contemplated ownership in fee,* and she had received only a provisional surface right. *Besides, while in paragraph 6 in confirming the allotment brought it under those provisions of the Agreement that contemplated a patent in fee,* it was still only a partial dividend out of the property of the tribe."

In this opinion the court further said:

> "It is perhaps unnecessary to say that the subsequent issue of a patent to the 'Heirs of Agnes Hawes,' without naming them, conveyed the legal title to those persons upon whom the equitable title was conferred by the Original Agreement.
>
> "The restrictions upon alienation contained in the Original Agreement did not apply to allotments made on behalf of deceased members of the tribe. *Skelton vs. Dill,* 235 U. S., 206, 210; *ante,* 198, 200; 35 Sup. Ct. Rep., 60."

Also the Circuit Court of Appeals, Eighth Circuit, in the case of *Welty vs. Reed,* 231 Fed., 930, said:

> "The one and only question involved in the present case is whether the heirs of Thomas Knight had power to alienate the allotment originally made in the name of their father (who died prior to the taking effect of the original Creek allotment) but which was subsequently confirmed by patent in them prior to August 8, 1907, which is the date of the expiration of the five-year period of restriction imposed by the Original and Supplemental Creek Agreements. In other words, do the restrictions of those agreements apply in a case where an allotment was made in the name of a father, who died prior to the Original Creek Agreement and before a patent was issued to him, whose heirs afterwards received the patent directly therefor?

"This case was heard by this court at its December term, 1914, and a decision was reached reversing the judgment of the district court and sustaining the contention of the defendant Welty. *Welty vs. Reed,* 219 Fed., 864; 135 C. C. A., 534. Afterwards, the attention of the court being called to the decision of the Supreme Court in the case of *Woodward vs. De Graffenreid,* 238 U. S., 284; 35 Sup. Ct., 764; 59 L. Ed., 1310, which had not appeared prior to the decision of the present case by this court, we sustained a motion for a rehearing. The Woodward case has now been carefully and critically considered, and in our opinion it presents a case altogether similar in its facts to the case now before us. In it the points now relied upon by opposing counsel in support of their respective contentions in this case were given exhaustive consideration by the Supreme Court, and that court held with the contention of the appellee that *an allotment made to a Creek Indian in his lifetime, who afterwards received a patent for the land, took only a provisional surface right, and that such allottee had not been placed in possession of an allotment, or had not 'received an allotment'* as contemplated by section 7 of the Original Creek Agreement, or section 16 of the Supplemental Creek Agreement, *and that as a result the final allotment and patent made to the heirs of such allottee did not subject them to any of the restrictions against conveyance of their land found in these sections."* (Italics ours.)

The Osage Division act provided a plan, method, or scheme, the main object of which was to divide or "partition" the lands and funds of the Osages, whereby the title of the United States and the Osage tribe of Indians was to be "excluded from the whole" and title of each individual member of the tribe, or his heirs, made "exclusive in a part." This was accomplished by the execution of deeds by the principal chief for the Osages, approved by the Secretary

of the Interior as per section 8 of the Osage Division act which provides:

> "Section 8. All deeds to said Osage lands or any part thereof shall be executed by the principal chief for the Osages, but no such deeds shall be valid until approved by the Secretary of the Interior."

As was said in *Sizemore vs. Brady, supra,* the Osage Division act *contemplated that various preliminary acts were to precede any investure of individual rights. The land and funds to which it related were tribal property, and only as it was carried into effect were individual claims to be fastened upon them.*

The fourth paragraph of section 2 provides *inter alia* with respect to homestead that the "certificate of allotment and deed shall designate the same as a homestead." But no "certificates of allotments" were ever made or issued.

The sixth paragraph of section 2 provides *inter alia* that

> "The schedules of said selections and divisions of lands herein provided for shall be subject to the approval of the Secretary of the Interior."

If certificates of allotment had, in fact, been issued, and if a member could be said to have *received* an allotment upon receipt of such certificate, yet plaintiff in error would not be benefited thereby, because such allotment certificate could not have been issued before the approval of the schedule of *selections* (of members) and *divisions* (of remaining lands by the Commission) by the Secretary of the Interior. The schedule of the first, second, and third selections was not approved by the Secretary of the Interior until November 19, 1908, three months after the death of Lah-tah-sah, and the schedule of "final division" was not approved by the Secretary until August 2, 1909, nearly one year after the death of Lah-tah-sah, who died August 19, 1908.

Only two schedules were made out—one schedule embracing the first, second, and third selections, and the second

schedule embracing the final division of the remaining lands made by the allotting commission.

A joint resolution of February 27, 1909 (35 Stat. L., 1167), provides that homesteads of members of the Osage tribe may consist of land designated of any one or more of the first three allotment selections. This conclusively shows that up to February 27, 1909, the matter of selecting and designating homesteads was yet an open question, and that after February 27, 1909, the homestead might be designated from any one or more of the first three selections. This was six months after the death of Lah-tah-sah.

It is quite manifest that at the time of the death of Lah-tah-sah, August 19, 1908, she had not "received" allotments of land and was not an allottee. In *Parkison vs. Skelton*, 33 Okla., 261, it is said: "The word 'allottees' refers to parties to whom allotment is made."

In *Bledsoe vs. Wortham*, 35 Okla., 261, the Supreme Court of Oklahoma, in construing the act of Congress of April 21, 1904 (33 Stat. L., 189, 204) said:

> "The allotment having been selected, the fact that no patent had issued did not prevent the conveyance of the allottee's equitable estate therein, but when the first deed was executed by Folsum, *he was not an allottee*, not having selected his allotment. Said act sought to take off the restrictions as to certain lands of *allottees*, not to remove restrictions upon distributive shares of *members* of the tribe. Such parties became *allottees only after the lands had been allotted to them*." (Italics ours.)

Lands Involved Not Restricted Lands.

Counsel for plaintiff in error have assumed that the lands involved (in the partition suit of the plaintiff and the suit to quiet title and for possession, based on the answer and cross-petition of the defendant John Kenny, the judgment rendered in which was pleaded as *res adjudicata* in the county court and in the district court on appeal in the probate pro-

ceedings arising on the final account of the administrator) were *allotted* Osage Indian lands burdened with restrictions against alienation. This presumption is, in our judgment, a violent one, and not warranted by either the law or the facts.

Under our first proposition stated above the real question is whether allotments of lands in the Osage Nation which were made on behalf of Lah-tah-sah, deceased, passed their lands to her heirs free from restrictions upon alienation. This is a Federal question. In *Skelton vs. Ditt*, 235 U. S., 206; 59 L. Ed., 198, in stating the Federal question, the court said:

> "Whether an allotment of land in the Creek Nation, which was made on behalf of Archie Hamby, a Creek child, then deceased, passed the lands to his heirs free from restrictions upon alienation, is the Federal question in this case."

There are no restrictions against alienation upon the lands embraced in the Osage Nation except such as were imposed by the act of Congress of June 28, 1906, *supra*. This act provided that all lands were to be *divided* among the members of said tribe, *giving each his or her fair share thereof in acres*. Section 2 of said act provides, *inter alia*:

> "Each member of said tribe, as shown by the roll of membership made up as herein provided shall be permitted to select one hundred and sixty acres of land as a first selection.

The third subdivision of said section 2 provides:

> "After each member has selected his or her first selection as herein provided, he or she shall be permitted to make a second selection of one hundred and sixty acres of land in the manner herein provided for the first selection."

The fifth subdivision of said section 2 provides:

> "After each member has selected his or her first, second, and third selections of one hundred and sixty

> acres of land, as herein provided, the *remaining* lands of said tribe in Oklahoma Territory, except as herein provided, shall be *divided* as equally as practicable among said members by a commission to be appointed to supervise the selection and division of said Osage lands."

After the *first, second, and third* selections were made by or on behalf of each member of the tribe as provided for there were *remaining lands* amounting to one hundred eighty acres to each member, which was divided by the Commission as provided by the section just quoted, and which lands are designated in subdivision 4 of section 2 as *"His share of the remaining lands allotted to the members."*

The fourth subdivision of said section 2 provides *inter alia:*

> "After each member has selected his or her second selection of one hundred and sixty acres of land as herein provided, he or she shall be permitted to make a third selection of one hundred and sixty acres of land in the manner herein provided for the first and second selections.
>
> * * * "Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and non-taxable until otherwise provided by act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land, and shall be inalienable for twenty-five years, except as hereinafter provided."

Stated in the form of a syllogysm, we have:

1. All restrictions are imposed by the provisions of the fourth paragraph of section 2.

2. The provisions of the fourth paragraph of section 2, taken in their natural sense, apply only to allotments made to a member of the tribe (while living).

3. Therefore, only *allotments* made to members of the tribe (as such while living and in their own right), and *not* lands *inherited,* are restricted.

In Levindale Lead & Zinc Mining Co. *vs.* Coleman, 241 U. S., 432, this court in construing said fourth paragraph of sec. 2 said:

> "Taken in their natural sense, the provisions of the fourth paragraph of section 2 apply only to *allotments* made to members of the tribe. There is nothing to suggest that a non-member should designate a 'homestead' and unless lands were thus segregated the restrictions as to 'homesteads' would not apply. With respect to 'surplus lands' it will be observed that it is *only selections of each 'member,' and the share of remaining lands 'allotted to the member,' which constitute lands so described and thus come under the State restrictions.* (*Italics ours.*)

We wish to emphasize the fact that it was only a member living at the time of taking an allotment that could designate land from one or more of *his three* selections as a homestead and that there is no provision for the designation of a homestead by any *living* member of the tribe except that such designation be made from one or more *of his three selections.* In other words, the land authorized to be designated as a homestead must be a selection of one hundred and sixty acres of land allotted to a *living member in his own right* selected from the approved schedule of the first, second, and third selections. And the Supreme Court of the United States in the Levindale Case, *supra,* says: *"And unless lands were thus segregated, the restrictions as to homesteads would not apply."* By the joint resolutions of February 27, 1909 (35 Stat., 1167), it is provided that homesteads of members of the Osage tribe may consist of land designated *from* any one or more of *their three allotment* selections. That is an eighty-acre might be designated from the first selection and an eighty acres from the second selection; but, says the Supreme Court of the United States in the Levindale Case, *supra:* "This does not suggest that non-members were supposed to designate homesteads." We may add that this does not suggest that a member was supposed to designate a home-

stead in his own behalf and another homestead on behalf of deceased ancestor, nor does it suggest that a member may designate a homestead in his or her own behalf and a one-half or a one-third of a homestead on behalf of such deceased ancestor. In other words, the homestead provided for in said act of Congress and on which restrictions against alienation was imposed, was a homestead for the living and not for the dead. If the heir, of a deceased member, be a member of the tribe, he would have a homestead, as such member, in his own behalf and was entitled to no other or further homestead under said act of Congress. If such heir be a *non-member,* he was not entitled to any homestead at all. And, unless one hundred and sixty acres of land were segregated, designated and selected from one or more of *his three selections* as a homestead by a living member of the tribe and allotted and deeded to such living member, as such the restrictions as to homestead would not apply. In the case at bar, Lah-tah-sah died long before any lands were deeded to her and designated no one of the three selections deeded in her behalf as a homestead and no restrictions attached to the lands purported to be deeded to her as a homestead. She died August 19, 1908, the purported homestead deed was dated September 23, 1908, but not approved by the Secretary of the Interior until February 20, 1909, and the schedule of the first, second, and third selections was not approved by the Secretary of the Interior until November 19, 1908, as hereinafter shown.

As to the surplus lands the Supreme Court of the United States in the Levindale case, *supra,* says that "With respect to surplus lands it will be observed that it is only selections of each member and the share of remaining lands allotted to the member, which constitute lands so described *and thus so come under the stated restrictions,*" so that which respect to surplus lands, no restrictions were imposed except as to the *"other two selections* of each member together with *his share of the remaining lands allotted to the member* that come under the stated restrictions." Thus restrictions against alienation were

imposed only as to allotments made to members of the Osage tribe of Indians who were living at the time the lands were allotted and deeded under the provisions of said act of Congress.

Bearing in mind the fact that the allotment and conveyance by allotment deeds of the lands in question were *not* made to said Lah-tah-sah in her lifetime as a living citizen and member of the Osage Tribe of Indians in her own right, she having died prior thereto, we call attention to the case of *Skelton vs. Dill,* 235 U. S., 206; 59 L. Ed., 198, where among other things, it is said:

> "Where these restrictions were intended to apply only to allotments made to living citizens in their own right, or to apply as well to allotments made on behalf of deceased members, is the question for decision. The Supreme Court of the State, when passing upon this case, held (210) them applicable to both classes of allotments, but in the later case of *Rentie vs. McCoy,* 35 Okla., 77; 128 Pac., 244, reached the other conclusion, as did also the district court for the Eastern District of Oklahoma in *Reed vs. Welty,* 197 Fed., 419. We think the better reasoning lies with the view that the restrictions apply only to allotments made to living citizens in their own right. Not only do the provisions of section 16 of the supplemental act lend themselves to that view, but in those sections of both acts which deal with allotments on behalf of deceased persons there is no suggestion of a restriction upon alienation. This difference in legislative treatment doubtless was deliberate, and reflects a corresponding difference in purpose. In *Mullen vs. United States,* 224 U. S., 448; 56 L. Ed., 834; 32 Sup. Ct. Rep., 494, a like question arose under the original and supplemental acts relating to the Choctaw and Chickasaw lands, and we held that the restrictions upon alienation imposed by those acts were applicable to allotments to living members in their own right, but not to allotments on behalf of members then deceased."

There are no provisions in the Osage Allotment act, *supra,*

imposing restrictions upon alienation, and no provision for the designation of a homestead except in allotments deeded to living members.

In the case of *Reed vs. Welty,* 197 Fed., 419, *supra,* the United States District Court for the Eastern District of Oklahoma said:

> "Section 7, of the Original Creek agreement (act, March 1, 1901, c. 676, 31 Stat. 863), and Section 16 of the Supplemental Agreement (act, June 30, 1902, c. 1323, 32 Stat. 503), under which allotments of lands were made, providing that lands allotted to citizens shall not in any case be alienable before the expiration of five years from the ratification of the agreements respectively, did not apply to lands allotted to heirs of an enrolled citizen who died before receiving his allotment, and as to such lands the said agreements imposed no restriction upon the right of alienation."

In the case of *Mullen vs. United States,* 224 U. S., 448; 32 Sup. Ct., 494; 56 L. Ed., 834, this honorable court, *inter alia,* said:

> "It is true that under the Creek agreement, in cases where the ancestor died before allotment, the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw agreement the allotment was to be made in the name of the deceased member, and 'descend to his heirs.' This, however, is a merely formal distinction and implies no difference in substance. In both cases the lands were to go immediately to the heirs, and the mere circumstance that, under the language of the statute, the allotment was to be made in the name of the deceased ancestor instead of the names of the heirs furnished no reason for implying a requirement that there should be a designation of a portion of the lands as homestead.
>
> "We have, then, a case where all the allotted lands going to the heirs are of the same character, and there is no restriction upon the right of alienation expressed in the statute. Had the lands been allotted in the lifetime of the ancestor, one-half of them, con-

stituting homestead, would have been free from restriction upon his death. The only difficulty springs from the language of paragraph 16, limiting the right of heirs to sell 'surplus' lands. But, on examining the context, it appears that this provision is part of the scheme for *allotments to living members, where there is a segregation of homestead and surplus lands respectively*. Whatever the policy of such a distinction which gives a greater freedom for the disposition by heirs of homestead lands than of the additional lands, there is no warrant for importing it into paragraph 22, where there is no such segregation. It would be manifestly inappropriate to imply the restriction in such cases so as to make it applicable to all the lands taken by the heirs, and there is no occasion or authority for creating a division of the lands so as to impose a restriction upon part of them. (Italics ours).

"There being no restriction upon the right of alienation, the heirs in the case involved in this appeal were entitled to make the conveyances. The bill alleged that the tracts embraced in these conveyances were 'allotted lands,' and certificates of allotment had been issued. These Indian heirs were vested with an interest in the property which, in the absence of any provision to the contrary, was subject of sale. The fact that they were 'full-blood' Indians makes no difference in this case, for, at the time of the conveyances in question, heirs of the full-blood, taking under the provisions of paragraph 22 of the supplemental agreement, had the same right of alienation as other heirs." * * *

In the Mullen case, *supra*, the Supreme Court of the United States further says:

"While the lands were to be allotted in the name of the deceased they passed at once to his heirs, and as each heir, if a member of the tribe, was already supplied with his homestead of 160 acres, there was no occasion for a further selection for that purpose from the inherited lands. No distinction is made between the heirs; they might or might not be members of the tribe and where there were a number of heirs, each would take his undivided share. It is quite evident

that there is no basis for implying the requirement that in such case there should be a selection of portion of the allotment as a homestead, and all the lands allotted under paragraph 22 are plainly upon the same footing. While it appears from the record that, in the present case, separate certificates of allotment were issued for homestead and surplus lands, this was without the sanction of the statute."

So, in the case at bar, while the lands were allotted and deeded to La-tah-sah subsequent to her death, they passed at once to her heirs. She being dead, and her heirs being members of the tribe, they were each "already supplied with a homestead of 160 acres" and "there was no occasion for a further selection for that purpose from the inherited lands."

In the case of *Hancock vs. Mutual Trust Company,* 24 Okla,. 391; 103 Pac., 566, it is said:

"The Congress of the United States and the members of the different tribes clearly foresaw that the increasing pressure of white people surrounding these nations, crowding over and intermingling with them, rendered a further continuance of their qualified trial independence of the Government of the United States not only impracticable, but also that the friction occasioned by an effort to continue it would work to the deteriment of all parties. Out of this situation grew the conviction that it would be wiser and more conducive to the best interests of all to divide the national wealth among the children of the tribes who were then living and among the heirs of those whose names were upon the roll on a day certain. When this was done, and each had received his portion, then would come a dissolution of the ties which had bound them together as a government, and each with his patrimony would go his separate way. Under the old regime, when a member of the nation dies, his interest in the property of the nation went back to the entire body of the people; but this was not to be under the treaty into which they entered, and which is now before us, for, under it, a roll of the membership of the nation and those who were entitled to participate in its assets was provided for." * * *

In the Hancock case, *supra*, it is pointed out that under the Creek agreement the estate of a deceased member of the Creek tribe passes to the heirs, not under any tribal or Federal act prescribing a limitation upon alienation by the heirs, and in this connection said:

> "It is provided that the heirs shall take under the terms of a separate and specific statute, to-wit, the laws of descent and distribution as provided in chapter 49 of Mansfield's Digest of the Statutes of Arkansas. These laws contain no restrictions on alienation, and the rights of the heirs under them, being recognized by this treaty, carried the property to them free, clear, and unincumbered."

As in the case of the Creeks, all Osages were to participate in the allotment and division of the lands of the Osage Tribe of Indians whose names were on the Osage Tribal roll on a date certain, to wit, January 1, 1906, and children born to such enrolled members between January 1, 1906, and July 1, 1907.

Section 6 of the Osage allotment act, *supra*, provides:

> "That the lands, moneys, and mineral interests, herein provided for, of any *deceased* member of the Osage Tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally."

Allotments of land to which a Creek Indian was entitled at the time of death, but which had not been actually allotted, descended to his legal heirs, as stated in the Hancock case, *supra*, in accordance with the laws of descent and distribution as provided in chapter 49 in Mansfield's Digest of the Statutes of Arkansas, which contained no restrictions upon alienation. Consequently the heirs took such inheritance free, clear, and unincumbered of restriction upon alienation.

In like manner, on the death of an Osage Indian whose name was on the tribal roll January 1, 1906, or who was born to such enrolled member between January 1, 1906, and July 1, 1907, such death taking place before allotments were actually made the lands, moneys, and mineral interests of such deceased member descended to his or her legal heirs according to the laws of the Territory or of the State of Oklahoma, as provided in section 6 of the Osage allotment act above quoted. Said section 6 contains no provision imposing restrictions upon alienation of such an inheritance. The laws of Oklahoma put in force by said section 6 contain no limitation or restriction on alienation, and no provision is found in said Osage allotment act imposing a restriction upon alienation of any such lands inherited by the legal heirs of a deceased member of the Osage Tribe of Indians. The lands involved in this case having been allotted and deeded after the death of said Lah-tah-sah there were no restrictions upon the right of alienation, imposed.

Where allotments of land were deeded under the provisions of the Osage allotment act to a member having died prior to receiving his or her allotments, such allotments were taken by the heirs with no restrictions upon such alienation, as such allotments descended to such heirs in accordance with the laws of Oklahoma, which contained no provision imposing a restriction upon alienation. As heretofore pointed out, the Osage allotment act contains no provision imposing restrictions upon alienation except as to such allotments as were deeded to living members of the Osage Tribe of Indians in their own right.

Osage Division Act Complete Within Itself.

The act of Congress, *supra*, is, as its title indicates, *"an act for the division of the lands and funds of the Osage Indians in Oklahoma."* The *"lands* of the Osage Indians" consisted of about one million six hundred thousand acres and the *"funds"* of the Osage Indians consisted of about nine million

dollars deposited in the Treasury of the United States. The act of Congress, *supra*, was NOT an Indian allotment act, but was a DIVISION act, for the *division* or *partition* in severalty among the members of the tribe *"of the lands and funds of the Osage Indians in Oklahoma."*

The last clause of section 1 of said act provides:

> "And the tribal *lands* and tribal *funds* of said tribe shall be equally *divided* among the members of said tribe as hereinafter provided." (Italics ours.)

Section 2 of said act provides:

> "That all *lands belonging* to the Osage tribe of Indians in Oklahoma Territory, except as herein provided, shall be *divided* among the members of said tribe, giving to each *his* or *her* fair share thereof in acres, as follows:" (Italics ours.)

The *first* subdivision of section 4 of said act provides *inter alia*:

> "That all the *funds* of the Osage tribe of Indians, and all the *money* now due or that may hereafter be found to be due to the said Osage tribe of Indians, and all *moneys* that may be received from the sale of their lands in Kansas under existing laws, and all *moneys* found to be due to said Osage tribe of Indians on claims against the United States, after all proper expenses are paid, shall be *segregated* as soon after January first, nineteen hundred and seven, as practicable and placed to the credit of the individual members of said Osage tribe on a basis of a *pro rata division* among the members of said tribe, as shown by the authorized roll of membership as herein provided for, or theirs as hereinafter provided."

Section 8 of said act provides:

> "That all deeds to said Osage lands or any part thereof shall be executed by the principal chief for the Osage, but no such deeds shall be valid until approved by the Secretary of the Interior."

The *division* of the "funds" of the Osage Indians was accomplished by a simple calculation and a change in bookkeeping by which the account of the United States with the Osage tribe of Indians was changed from the tribe to the individual members of the tribe, or their heirs, "on a basis of a *pro rata division*" of THEIR funds.

The final *division* of the "lands of the Osage Indians" was accomplished by the execution, approval, and delivery of *deeds* by which the fee-simple title was conveyed to each member in and to "his or her fair share thereof in acres."

The restriction upon alienation where the deeds were executed and delivered to a member of the Osage tribe of Indians in his lifetime was, and is, not inconsistent with the conveyance of a fee-simple title. On this proposition the Supreme Court of the United States, in *Libby vs. Clark*, 118 U. S., 250; 30 L. Ed., 133, said:

> "The title conveyed to Hurr by the patent was a fee simple: that is, it was all the title or all the interest in the land. No one shared this title, or had any interest in it, and it descended, or would have descended to his heirs. The restrictions on his right to convey did not deprive the title of the character of a fee-simple estate. 'An estate in fee simple is where a man has an estate in lands or tenements to him and his heirs forever.' 4 Comyn's Digest 1, Article, Estate. The limitation of the power of sale for five years is not inconsistent with a fee-simple title."

No restrictions were imposed on any lands of the Osages, for the *division* of which provision was made by the Osage *Division* act, *supra*, except *such* as were imposed by the fourth paragraph of section 2, to wit: The *homestead* must be designated from one or more of the three approved selections made by a member of the tribe and deeded to him or her as such in his or her lifetime. And, in the language of the Supreme Court of the United States, *"Unless lands were thus segregated the restrictions as to homestead would not apply,"* and did not apply in the case at bar.

As to *surplus* lands said fourth paragraph of section 2 provides:

> "The *other two selections* of each member, together with his share of the *remaining lands* allotted to the member, shall be known as *surplus* land, and shall be inalienable for twenty-five years, except as hereinafter provided." (Italics ours.)

In the Levindale case, *supra*, the Supreme Court of the United States said:

> "With respect to *surplus* lands it will be observed that it is only *selections of each member* and the *share of the remaining lands allotted to the member which* constitute lands so designated and thus *come under the stated restrictions.*" (Italics ours.)

It is only *homestead* and *surplus* that any restrictions are imposed upon. In order to assume the character of *homestead* the same *must* be designated and deeded to a living member as such. The *surplus* consists *only* of "*the other two selections of each member, together with his share of the remaining lands allotted to the member.*" It is only lands thus described which constitute *surplus* land and thus *come under the stated restrictions* applicable to *surplus* land.

The lands involved in the case at bar are neither *homestead* nor *surplus*. Had said Lah-tah-sah been living at the time the lands were allotted and deeded she would have had the right to have had the lands in question, or similar lands consisting of a like number of acres allotted and deeded to her as *homestead* and *surplus*, but having died prior thereto the right to such lands, and the lands in question, descended to her legal heirs, not as *homestead* or as *surplus* but merely as inherited lands.

By inadvertence the allotment deeds, although executed long after death of said Lah-tah-sah, were made to run to said Lah-tah-sah as grantee. But this is immaterial.

In *Mullen vs. United States,* 224 U. S., 448; 32 Sup. Ct., 494; 56 L. Ed., 834, the court said:

> "It is true that under the Creek agreement, in cases where the ancestor died before allotment, the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw agreement the allotment was to be made in the name of the deceased member, and descend to the heirs. This, however, is a merely formal distinction and implies no difference in substance. In both cases the lands were to go immediately to the heirs, and the mere circumstance that, under the language of the statute, the allotment was to be made in the name of the deceased ancestor instead of the names of the heirs furnished no reason for implying a requirement that there should be a designation of a portion of the lands as homesteads."

Had the allotment deeds in question been required by the statute to run to the deceased member stead of to the heirs, that fact would have made no difference, and the fact that the deeds of allotment were inadvertently made to run to the deceased member instead of the heirs makes no difference, as the lands, moneys, and mineral interests descended immediately upon her death to her heirs under the provisions of section 6 of said Osage *division* act, *supra,* and without restrictions upon alienation.

Res Adjudicata.

We insist that the judgment rendered by the District Court in the partition suit, and pleaded and proven in the case at bar, was final and conclusive on the parties hereto as to the fact of marriage of Laban Miles and Lah-tah-sah.

> "The general policy of the American statutes is to permit the parties in proceedings for partition to present and have determined every material question relating to the title so that, as a result of the proceedings, each person having an allotment made to him and each purchaser acquiring title under a decree of

sale may rest assured that he has acquired the title and interest of every person who has been before the court. All issues may be presented and determined which are necessary to the accomplishment of this result, and the determination, when made, is final and conclusive and none of the parties can maintain any subsequent action or proceeding inconsistent with the determination thus made. *Irvin vs. Buckles,* 148 Ind., 389; 47 N. E., 822; *Finley vs. Catchcart,* 149 Ind., 470; 48 N. E., 586; *Bove vs. Graham,* 89 Mo., 200; 1 S. W., 90; *Lindell R. E. Co. vs. Lindell,* 142 Mo., 61; 43 S. W., 368; *Whittemore vs. Shaw,* 8 N. H., 397; *Clopp vs. Bromaghan,* 9 Cow., 530; *Buttler vs. Buttler,* 58 N. Y. Supp., 1049; *Morrill vs. Morrill,* 20 Or., 96; 25 Pac., 362; 11 L. R. A., 155.

"A judgment upon the ownership of property, where that is a material point in issue, is *res adjudicata* in all subsequent actions between the same parties and their privies, upon the question of ownership. *Hughes vs. United Pipe Lines,* 29 N. Y. St. Rep., 564, and

"Both parties, having consented to litigate, are bound by the judgment. *Helck vs. Reinheimer,* 105 N. Y., 470.

In *Kromer vs. Friday,* 10 Wash., 621; 32 L. R. A., 671, it is said:

"Partition is a civil action, in contemplation of our code, and may be used as a form of action to try title. The rights of the several parties, plaintiffs as well as defendants, may be put in issue, tried and determined in such suit, and

"The determination of the fact of title by the court is held to be conclusive upon all the parties to the suit. *Hancock vs. Lopez,* 53 Cal., 362-371.

"A judgment in partition is conclusive upon all persons having any interest who were made parties to the proceeding, including persons summoned by publication only, persons duly cited as 'unknown owners,' infants and married women, and those having contingent or expectant interests or possibilities, even though not *in esse,* if represented on the record by the person entitled to the first estate of inheritance. 23 Cyc., 1334."

"On the question of *res adjudicata* it is immaterial that the questions alleged to have been settled by a former adjudication were determined in a different kind of proceeding or a different form of action from that in which the estoppel is set up, the parties and the issues being the same." 23 Cyc., 1221.

Conclusion.

In conclusion, we submit that this court has no jurisdiction, and that the case should be dismissed. But should the court hold it has jurisdiction, then we submit that the judgment of the Supreme Court of Oklahoma holding that the District Court had jurisdiction and its judgment was final in the partition suit, because: *First,* the judgment did not need approval by the Secretary of the Interior to give it finality; and, *Second,* the lands involved were *not restricted* lands of a deceased Osage *allottee,* and the judgment should be affirmed.

Respectfully submitted,

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